In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1641

KNAPP-SHERRILL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 488 F. 2d 655. The Board decision and order in the unfair labor practice case (Pet. App. 16a-29a) are reported at 201 NLRB No. 20. The decision and order in the related representation case (Pet. App. 30a-36a)[1] are reported at 196 NLRB 1072.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1974 (Pet. App. 11a). The petition for a writ of certiorari was filed on May 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The Hearing Officer's Report and Recommendations are omitted from petitioner's appendix. They are set forth at A. 19-31. ("A." refers to the appendix to the briefs filed in the court of appeals.)

QUESTION PRESENTED

Whether the Board properly overruled the company's challenges to ballots cast by 11 "temporary seasonal" employees in a representation election conducted pursuant to a stipulation agreement between the union and the company.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 13a-15a.

15a.

STATEMENT

Petitioner is engaged in the processing of various vegetables and fruit juices (Pet. App. 3a). It employs 50 to 60 regular full-time workers and 30 to 35 "regular seasonals" are hired when a particular crop comes in. During the tomato canning season additional employees (170 to 200 in 1970, for example) are required; these "temporary seasonals" receive hiring preference when additional help is required throughout the year. Thus, many work on a regular basis during the busy season (Pet. App. 4a).

On March 11, 1971, the Union[2] filed a petition for certification as bargaining representative (A. 19). Shortly thereafter a "Stipulation for Certification upon Consent Election" was signed in which the parties agreed to proceed to an election in a bargaining unit including "[a]ll production and maintenance employees * * * employed at the Employer's facilities at * * * Donna, Texas", and that the election would "be held

[2]Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 173.

in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board." Regarding voter eligibility the Stipulation provided (Pet. App. 2a):

> The eligible voters shall be those employees included within the Unit * * * who were employed during the [March 31, 1971] payroll period * * *, including employees who did not work during the payroll period because they were * * * temporarily laid off * * *.

Pursuant to the Stipulation an election was conducted on April 29, 1971; 85 votes were cast for the Union, 84 against, and 18 were challenged because the voters' names did not appear on the Company's eligibility list. A hearing was held and the Hearing Officer upheld 13 of the 18 challenged ballots; 11 of the 13 were cast by temporary seasonal employees (Pet. App. 3a). In rejecting the Company's contention that these employees were not eligible to vote, the Hearing Officer considered the Stipulation's eligibility provision and concluded that (A. 28-29):

> "temporary seasonals," worked under the same general conditions as the "regular seasonals" whose eligibility is not questioned. The difference rests only in the circumstance that their periods of employment were shorter and less certain than those of the "regular seasonals." * * * Because of this work history and because the record otherwise demonstrates that each had a reasonable expectation of substantial employment from year to year, I find that they shared a community of interest with the Employer's regular work force and the "regular seasonals."

The Board (Chairman Miller dissenting) adopted the Hearing Officer's Report (Pet. App. 30a-36a). The revised tally showed a 93-88 Union majority, and the Union was certified as the employees' representative (Pet. App. 19a20a). The Company then refused to bargain and the Union filed charges alleging a violation of Section 8(a)(5) and (1) of the Act. The Board (Chairman Miller dissenting) rejected the Company's contention that it had "evidence which was previously unavailable at the hearing on the challenged ballots" (Pet. App. 5a) and granted the General Counsel's motion for summary judgment. The Board ordered the Company to bargain with the Union (Pet. App. 16a-29a).

In the court of appeals the Company argued that the "Board erred in deciding the challenges in terms of its customary rules rather than in terms of whether they were eligible to vote as provided by * * * the parties in the Stipulation" (Pet. App. 8a). The court recognized that the "Stipulation controls unless its provisions are repugnant to the Act or to settled Board policies," but found that there was "no evidence that the parties even discussed the inclusion or exclusion of temporary seasonal employees who were not working on the eligibility date, much less that they agreed on the issue" (Pet. App. 7a-8a). Absent such evidence of agreement, the court approved the Board's use of its customary standard in determining whether the challenged voters fell within the "temporarily laid off" provision of the Stipulation. Reviewing the evidence presented to the Hearing Officer, the court affirmed the Board's finding that the 11 employees had a "reasonable expectation of recall so as to justify their inclusion in the bargaining unit," and enforced the Board's order (Pet. App. 7a-10a).

ARGUMENT

Petitioner contends that the Board ignored the parties' agreement in applying general eligibility principles to determine whether the ballots of the temporary seasonals should be counted (Pet. 11-13). However, the Stipulation simply provided that "employees who did not work during the payroll period because they were * * * temporarily laid off" (Pet. App. 2a) would be eligible to vote. Such "boilerplate" language, read in the light of the further statement that the election would "be held in accordance with * * * the applicable procedures and policies of the Board" (*ibid.*), may reasonably be construed—absent clear evidence that a contrary interpretation is intended—as incorporating the general Board rule that seasonal employees who are out of work on the eligibility date but have a reasonable expectation of reemployment in the future are eligible to vote in a representation election.[3] The only question really presented is whether the Board and the court below were correct in finding that there was no probative evidence that the parties intended a contrary interpretation, *i.e.*, that only those temporary seasonals who were on the March 31, 1971 payroll would be eligible to vote. Such an issue, which turns on the facts of this particular case, does not warrant review by this Court.

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[3]Petitioner does not here contest the Board's finding that the 11 temporary seasonal employees would properly be included in the unit under this standard. See *National Labor Relations Board* v. *C.H. Sprague & Son Co.*, 428 F. 2d 938, 940 (C.A. 1); *National Labor Relations Board* v. *Hondo Drilling Co.*, 428 F. 2d 943, 946 (C.A. 5); *National Labor Relations Board* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 665-667 (C.A. 4).

In any event, the findings of the Board and the court below are fully justified. As the court below noted (Pet. App. 8a), "there is no evidence that the parties even discussed the inclusion or exclusion of temporary seasonal employees who were not working on the eligibility date, much less that they agreed on the issue." Nor was this deficiency cured by the belated and self-serving statements (Pet. 8-9, notes 4 and 5) which the Company adduced before the Board.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]By contrast, in *Tidewater Oil Co.* v. *National Labor Relations Board,* 358 F. 2d 363 (C.A. 2), relied on by petitioner (Pet. 11), the party contending for an unusual construction of the Stipulation produced persuasive evidence that each employee was discussed by name and his eligibility agreed upon prior to executing the Stipulation (*id.* at 364).